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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

Supreme Court, U.S.
FILED
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Nos. 614 and 615

THEODORE W. PARKER, individually and as Commissioner of the Department of Transportation of the State of New York, and JOHN VOLPE, individually and as Secretary of Transportation of the United States, WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, STANLEY S. RESOR, individually and as Secretary of the Army of the United States, and WILLIAM F. CASSIDY, individually and as Chief of Engineers, Corps of Engineers of the U. S. Army,

Petitioners,

—against—

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, SIERRA CLUB and THE VILLAGE OF TARRYTOWN, NEW YORK,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Citizens Committee for the Hudson Valley, Sierra Club and the Village of Tarrytown, New

York, plaintiffs in the actions below, oppose the petitions of Theodore W. Parker and of John Volpe and other federal officials*, defendants in the actions below, for certiorari to the United States Court of Appeals.

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* In this brief respondents are referred to as plaintiffs and petitioners as defendants. The following additional short titles and abbreviations are used.

U. S. District Court for the Southern District of New York—the "District Court";

U. S. Court of Appeals for the Second Circuit—the "Circuit Court";

Decision of District Court, per Hon. Thomas J. Murphy, U.S. D.J., dated July 11, 1969—the "District Court Opinion";

Order, decree and judgment of the District Court dated July 25, 1969—the "Judgment";

Decision of Circuit Court dated April 16, 1970—the "Circuit Court Opinion";

Permit dated January 27, 1969, a copy of which is Pl. Ex. 7—the "Expressway Permit";

Citizens Committee for the Hudson Valley—the "Citizens Committee";

Village of Tarrytown, New York—the "Village";

Theodore W. Parker—"Parker";

John Volpe, Walter F. Hickel, Stanley S. Resor and William F. Cassidy—"Volpe", "Hickel", "Resor" and "Cassidy", respectively, all of whom are sometimes collectively referred to as the "federal defendants";

Department of Transportation of the State of New York—the "State DOT";

Department of Transportation of the United States—the "Federal DOT";

Corps of Engineers of the U. S. Army—the "Engineers";

The proposed Hudson River Expressway—the "Expressway";

Appendix to the federal defendants' petition—"A.".

Questions Presented

Parker's petition for certiorari presents two questions to this Court:

1. Does the Expressway involve dikes and a causeway within the meaning of those terms as used in 33 U. S. C. §401?

2. Does each of the plaintiffs have sufficient standing to bring these actions?

The federal defendants' petition presents only the first question stated above. The Solicitor General does not raise the standing issue.

Statement of the Cases

The Expressway is a six lane truck and passenger car road project planned to be built by the State DOT, of which Parker is now Commissioner. It would run from Tarrytown to a point approximately thirty-five miles north. The portion of the Expressway involved in these cases would be approximately ten miles in length and go along the eastern shore of and in the Hudson River, from Tarrytown to Crotonville. Over four miles of this proposed portion would rest on 9,500,000 cubic yards of fill which would extend at its widest point 1300 feet into the river. The fill would raise the land presently at river bottom to an elevation above the shore line. In these four consolidated actions, plaintiffs sought a judgment declaring the Expressway unlawful, and enjoining the defendants from proceeding with its construction.

The Village lies at the southern end of the Expressway, and would be crossed by part of it and bounded on the river side by another part of it. Part of the Village area that would be crossed by the Expressway is the

area of an urban renewal project which receives federal funding.

The Citizens Committee and the Sierra Club are two citizen conservation groups, the former local and in the area of the Expressway, and the latter national, with a local Atlantic Chapter and a large number of members in the area of the Expressway.

The actions involve three separate series of claims by plaintiffs:

1. Claims (hereinafter the "Sec. 401 claims") that construction of the Expressway would be in violation of 33 U. S. C. §§401, 403 and 525, and 49 U. S. C. §§1651 and 1655, in that:

> A. the Application by the State DOT for the Permit should have been treated by Resor and Cassidy as one involving the construction of "causeways, dams, or dikes" "over or in" a "navigable river" thus requiring the consent of Congress under 33 U. S. C. §401 and the approval of the Secretary of Transportation under 49 U. S. C. §1655 (g);
>
> B. it was unlawful for Resor and Cassidy to treat the Application as governed solely by 33 U. S. C. §403, not requiring the consent of Congress.

2. Claims (hereinafter the "Arbitrary action claims") that the grant by Cassidy and Resor of the Expressway Permit, purportedly under 33 U. S. C. §403, and the approval of the Expressway by Hickel's predecessor in office, Stewart Udall, purportedly under Public Law 89-605, were arbitrary, capricious and otherwise unlawful; and

3. Claims (hereinafter the "Constitutional claims") that the statute authorizing construction of the Expressway (Ch. 292, Laws of New York 1965, as amended by Ch. 128, Laws of New York 1966) is unconstitutional under the due process and equal protection clauses of the fourteenth amendment to the United States Constitution.

In its Opinion the District Court held:

> ". . . based on the evidence presented at trial, that 'dikes', characterized as such by the defendants, are to be constructed along the western side of the fill and that Congress when it said 'any dike' over or in any navigable river meant exactly that." (A. 14)

Judge Murphy also found and concluded that the Expressway provided for "a causeway supporting the road where it leaves the natural shoreline south of the Tappan Zee Bridge until the road reaches the southernmost point of the fill." (A. 102a). He sustained plaintiffs' Sec. 401 claims and held that it was unnecessary to rule upon their Arbitrary action claims. He denied plaintiffs' constitutional claims.

Prior to and at the trial defendants challenged the jurisdiction of the court and the standing of the plaintiffs. Jurisdiction of the suits was found by the District Court under the Administrative Procedure Act, 5 U. S. C. §701 *et seq.* With respect to the claims by the Village, jurisdiction was also found under the Federal Question Statute, 28 U. S. C. §1331(a).

As to standing, that of the Village was upheld on the basis of the Expressway's interference with its urban renewal project and the proof of the Village's loss of tax revenue. (A. 20-21). Judge Murphy also sustained the

standing of the Citizens Committee and the Sierra Club, relying on *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (2d Cir. 1965), cert. denied 384 U. S. 941 (1966), and *Road Review League* v. *Boyd*, 270 F. Supp. 650 (S. D. N. Y. 1967).

The Circuit Court Opinion affirmed the District Court Opinion and Judgment in all respects, upholding the District Court's jurisdiction, the standing of each of the plaintiffs, and the holdings as "to the merits of the controversy." (A.33). It also upheld the dismissal of plaintiffs' Constitutional claims.

The standing of each of the plaintiffs was sustained by the Circuit Court on substantially the same grounds as the District Court. With respect to the standing of the Citizens Committee and the Sierra Club, the Circuit Court stated:

> "We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest." [Citing *Scenic Hudson Preservation Conference* v. *Federal Power Commission, supra; State of Washington Dept. of Game* v. *Federal Power Commission*, 207 F. 2d 391 (9th Cir. 1953); and *Road Review League* v. *Boyd, supra.*] (A. 46-47).

Both Parker and the federal defendants now seek certiorari. Neither raises the jurisdictional issue. Both argue the merits. Parker alone questions the plaintiffs' standing. Plaintiffs oppose both petitions for certiorari.

Summary of Argument

1. The holdings of the District and Circuit Courts that the Expressway involves the construction of dikes and a causeway, as those terms are defined in 33 U.S.C. §401, and therefore requires the consent of Congress and the approval of the Secretary of Transportation, should not be reviewed by this Court.

2. Each of the plaintiffs has sufficient standing to bring these actions. The District and Circuit Courts found that the public interest in environmental resources—an interest which has been recognized both legislatively and judicially—is a legally protected interest, and that plaintiffs, as responsible representatives of the public, have standing to obtain judicial review of agency action which both the District and Circuit Courts have found to have been unlawful. The Village's standing also rests upon the District and Circuit Court findings that it would suffer a loss of tax revenue and interference with its urban renewal project. The position of Parker lacks merit and does not warrant a review of this issue by this Court.

POINT I

There is no merit to the applications for Supreme Court review of the District and Circuit Court judgments that the expressway involves dikes and a causeway.

The Circuit Court Opinion deals only "briefly with the merits of the controversy", and sustains the District Court's findings and holdings that the Expressway involves dikes and a causeway, pointing out the

> "29 days of trial, during which numerous exhibits were offered (including a model of the proposed Expressway), experts were examined, maps, charts and technical dictionaries were consulted and the facts were exhaustively presented." (A. 48)

The Dikes

The holdings of the District Court and Circuit Court as to the presence of dikes are attacked by defendants as:

1. in conflict with "prior decisions of this Court" (Parker petition, p. 7);

2. constituting "a strained and illogical interpretation to §§9 and 10 of the Rivers and Harbors Act of 1889" (Parker petition, p. 7); and

3. in violation of "a long-standing administrative interpretation of the statutes in question" (Parker petition, p. 7).

Let us consider first the "prior decisions of this Court". Only one Rivers and Harbors Act case is cited, *Wisconsin* v. *Illinois*, 278 U. S. 367 (1929). That case involved withdrawal of water from Lake Michigan, not dikes or causeways.

At issue was the construction of §10 of the Act, not §9. This Court discussed the relevant legislative history of §§9 and 10, pointing out that the Act of 1899 modified an earlier act and stating:

> "A new classification was made in Sections 9 and 10 of the Act of 1899, and substituted for Section 10 of the Act of 1890." *Id.* at 412.

After the portion of the opinion quoted above appears the portion quoted in Parker's petition, at pp. 7-9, the first two sentences of which are set forth below:

> "* * * Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized *in the classes of cases described in the second and third clauses of Section 10.* If the Section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of *the undertakings specifically provided for in the second and third clauses of Section 10* could safely be undertaken without a special authorization of Congress." (Emphasis supplied.)

The structures involved in the Expressway are neither "in the classes of cases described" nor "the undertakings specifically provided for", in "the second and third clauses of Section 10." They are "in the classes of cases described" and "undertakings specifically provided for in" Section 9 of the Act. They, accordingly, require the consent of Congress.

The claim that the courts below gave "a strained and illogical interpretation" to the statute is itself strained and illogical and is based on misstatements of the District and Circuit Court Opinions and of the evidence. The most glaring misstatement appears at page 9 of Parker's petition:

> "The District Court's determination that 'dikes' are involved in the construction of the Expressway is based upon the following reasoning which was adhered to by the Court of Appeals: Since the per-

> mit application submitted to the Corps of Engineers mentions the word 'dike', there is therefore a dike and consequently, the Corps of Engineers has no authority to issue the permit."

The evidence reviewed by the Circuit Court, as that before the District Court, was all of that received during the "29 days of trial." It included, of course, the permit application as well as numerous other references by the State DOT, its engineering consultants, and the Engineers to the dikes.

Defendants raise before this Court the same claims as those rejected by the District and Circuit Courts concerning a purported "long-standing administrative practice" (Parker petition, p. 7) with regard to what constitutes a dike. Passing for the moment the question of whether any administrative practice of acting unlawfully can become lawful by the passage of time or the frequent repetition of the unlawful acts, the question arises of what proof lies in the record of such administrative practice. The answer is that no such proof exists.

Reference is made in Parker's petition (p. 10) to situations in which the word "dikes" appeared and the Engineers granted the applications. Why such cases were not brought to the attention of the District Court during the trial is not stated. Presumably the vast resources of the several defendant governmental departments and their legal staffs were available prior to and during as well as after trial. No application has ever been made to reopen the record on the ground of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." Rule 60(b) Federal Rules of Civil Procedure. Defendants and their attorneys

obviously chose not to offer such evidence. They did not then deem it relevant, because none of the works concerned were at all similar to the expressway.

Plaintiffs submit that there has been no administrative practice such as that alleged by defendants. If, however, the completely unjustified concession is made that an administrative practice of the Engineers has heretofore permitted the construction of dikes, in violation of the express terms of 33 U.S.C. §401, authority, reason, and justice decree that such practice should end.

The authorities are clear that administrative practice can be of some aid in the construction of a statute, "but beyond question [it] cannot narrow the scope of a statute when Congress has plainly intended otherwise." *Neuburger* v. *Commissioner of Internal Revenue*, 311 U. S. 83, 89 (1940). In accord:

> *N.L.R.B.* v. *Globe Automatic Sprinkler Co. of Pa.*, 199 F. 2d 64 (3rd Cir. 1952);
> *Verbeem* v. *United States*, 154 F. Supp. 431 (Mich. 1957), *affirmed sub nom. Amlin* v. *Verbeem*, 356 U. S. 676 (1958).

If the Engineers have had a long-standing administrative practice of licensing dikes without considering 33 U.S.C. §401, such practice may well have become long-standing only because it was immune from review prior to the decision by this Court in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967) and that of the Circuit Court in *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (2d Cir. 1965), *cert. denied* 384 U. S. 941 (1966). Those decisions and others discussed under Point II of this brief now subject the Engineers to the test of Congress' substantive laws.

Those laws may and should be used to further

> "[the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." National Environmental Policy Act of 1969, Sec. 101(a). (Public Law 91-190).]

See also: *Zabel* v. *Jabb*, 5th Cir. July 16, 1970 reversing 276 F. Supp. 764 (S. D. Fla. 1969).

No reason exists for this Court's reviewing the District and Circuit Court judgments that the Expressway involves dikes.

The Causeway

The District Court held that:

> ". . . the proof at trial clearly shows a causeway supporting the road where it leaves the natural shore line south of the Tappan Zee Bridge until the road reaches the southernmost point of the fill." (A. 15)

Defendants repeat their twice-rejected claim that the causeway is a "mere possibility" (Parker petition, p. 14) to which the District and Circuit Courts should have blindfolded themselves. Tens of millions of dollars should be spent, millions of cubic yards dumped into the River, and vast physical and sociological changes effected, and *then and only then*, they say, should Congress and the Federal DOT consider whether to permit the causeway. The claim is unworthy of serious consideration by this Court.

POINT II

Each of the plaintiffs had standing to maintain these actions.

Parker, but not the federal defendants, seeks review by this Court of the question of the standing in court of each of the plaintiffs. The judgments of the District and Circuit Courts are said to represent "an unwarranted application of recent decisions of this Court." (Parker petition, p. 15)

This Court, as the Circuit Court below stated in its opinion:

> "has observed that the law of standing is a 'complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations * * *.' *United States ex rel. Chapman* v. *F.P.C.*, 345 U. S. 153, 156, 73 S. Ct. 609, 612, 97 L. Ed. 918 (1953). Judge (now Chief Justice) Burger, in his *Office of Communication of United Church of Christ* v. *F.C.C., supra,* opinion characterized the concept of standing as 'a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding * * *.' *Id.* 359 F. 2d at 1002." (A. 41-42)

The "practical and functional" effect of denial of standing to the plaintiffs in this action should be considered even before any analysis of the "recent decisions of this Court", said by Parker to have been wrongfully applied by the District and Circuit Courts.

The answer is nothing short of permitting a major and irrevocable alteration, which two courts have adjudicated

to be unlawful, of a resource which Congress has declared to be of "immense economic, natural, scenic, historic and recreational value to all the citizens of the United States." (Public Law 89-605). Parker's position is that even though such illegality has been adjudicated, and the District Court had jurisdiction of the subject matter of the actions (which both the federal defendants and Parker now concede), none of the plaintiffs herein is a person entitled to invoke that jurisdiction. The incorporated Village, in which thousands of the persons affected by the gargantuan and unlawful Expressway live and work, Parker says, may not be heard; nor may either of the two citizen organizations, whose purposes and objects are the protection of natural resources and of the human resources and values dependent upon those natural resources. Each plaintiff, it is claimed, must stand outside the doorways of the Court and wait for someone else to sue, to protect some more vested pecuniary and traditional interest of the nature of those to which courts may have limited themselves at times when there was no such thing as either an Expressway or a national environmental policy which directs that the short term and long term environmental effects of an Expressway be thoroughly considered before any federal agency authorizes the digging, filling and dike building. Unless such a person does come into court, says Parker, the unlawful dumping of 9,500,000 cubic yards of fill into the River may proceed, the unlawful dikes and causeways may be built, and the $125,000,000 or more necessary may be spent to build the unlawful project.

The position of Parker would be an anomalous one at any time. In a period of great national debate over whether personal conscience may be superior to law in various situations where the two are claimed to be in conflict, it is important that the position of Parker be understood for what it is: a claim that he is above and beyond the law.

The Standing of the Village

Before analysis of the "recent decisions of this Court" which Parker claims the courts below have misapplied, decisions which have expanded traditional concepts of standing and the nature of the interests which sustain standing, it is also important to point out that the standing of one of the plaintiffs, the Village, does not rest upon any such decisions, but upon the most narrow and traditional concepts. The Village's standing has been sustained because, as stated by the Circuit Court:

> "The district court found that the Village of Tarrytown would suffer 'loss of tax revenues and interference with the Urban Renewal project already in progress in the Village.' 302 F. Supp. at 1092. See Scenic Hudson Preservation Conf. v. F.P.C., 354 F. 2d at 616." (A. 47)

Those losses and interference, the District Court held, would exceed $10,000. Parker's comment concerning this holding is not any analysis of "recent decisions of this Court" but the bald allegation that the District Court erred in this finding of fact. Reference, but no citation, is made to alleged "uncontroverted proof" (p. 17) about the long term effect of the Expressway. This is a misstatement. The evidence was controverted. The District Court found the controverting evidence to be of greater weight and quality than Parker's evidence.

A second point is made by Parker with respect to the standing of the Village. It is claimed that the Village had "no legal standing to assail the validity of the state action." (p. 17) Neither of the cases cited supports the proposition. They do not deal with the right of a municipality to challenge unlawful activities by the State. See *Board of Education of Central School District No. 1* v. *Allen*, 20 N. Y. 2d 109, 281 N. Y. S. 2d 799 (1967), affirmed 392 U. S. 236 (1968).

The argument should also be summarily disposed of because of Parker's own acts in these consolidated actions. He moved to dismiss the two of the four consolidated actions brought against him on the ground of sovereign immunity. That motion was granted, except with respect to the Constitutional claims. 297 F. Supp. 809 (S. D. N. Y. 1969). Before the determination of that motion, however, and on the hearing of plaintiffs' preliminary injunction motion, Parker intervened in the actions brought against the federal defendants. He actively defended on the merits in all further proceedings, to and through trial, judgment and appeal to the Circuit Court. He may not now claim any sovereign immunity in the federal court, masked as a standing argument.

The Standing of the Citizens Committee and the Sierra Club

The standing question, with respect to the Citizens Committee and the Sierra Club, does call for some consideration of "recent decisions of this Court", three of which are cited by Parker:

> *Flast* v. *Cohen,* 392 U. S. 83 (1968);
> *Data Processing Service Org., Inc.* v. *Camp,* 397 U. S. 150 (1970); and
> *Barlow* v. *Collins,* 397 U. S. 159 (1970).

Parker's argument concerning "these recent cases" begins with the setting up of a straw man. Those decisions, it is said:

> "have apparently created the impression that standing is no longer an issue in any matter involving review of the actions of State and Federal officials." (pp. 15-16)

Neither the District nor the Circuit Court had any such "impression." The bases of the District and Circuit Court Opinions are clearly set forth therein. Parker's disregard of the facts and the record in the Courts below in this connection is characteristic of his entire petition. The Circuit Court Opinion does not refer at all to any of the three recent decisions cited by Parker. The most significant recent Supreme Court case to which the Circuit Court Opinion does refer, one not cited by Parker in his petition, is *Jenkins* v. *McKeithen*, 395 U. S. 411 (1969). The cases upon which both the District Court and the Circuit Court relied more directly are not Supreme Court cases, but the Second Circuit case of *Scenic Hudson Preservation Conference* v. *Federal Power Commission, supra,* and the District Court case of *Road Review League* v. *Boyd, supra.*

Let it be assumed, however, that Parker's argument is that the Circuit and District Courts *should have referred to Flast, Data Processing* and *Barlow*. *Flast* though not a direct precedent to support plaintiffs' standing in this action, did open the door that had been closed to taxpayers' suits since *Frothingham* v. *Mellon*, 262 U. S. 447 (1923). The Supreme Court viewed Mrs. Frothingham as lacking standing because she did not allege that Congress had breached a specific constitutional limitation of its taxing power, whereas Flasts's complaint was that a congressional act violated the constitutional provisions relating to the separation of church and state. The Court held that an ordinary citizen's right to insist that the government not violate the establishment of religion clauses of the First Amendment was a sufficient personal stake in the outcome to give the plaintiff standing. *Flast* v. *Cohen* is indicative of a trend toward liberality in determining who may invoke the judicial process.

In *Data Processing*, this Court reversed the Court of Appeals for the Eighth Circuit (406 F. 2d 837), which had affirmed the District Court for the District of Minnesota in its dismissal for lack of standing of a suit brought by sellers of data processing services. They had sought to challenge a ruling by the Comptroller of the Currency.

This Court, per Mr. Justice Douglas, held that the standing question is that of "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 80 Stat. 392, 5 U.S.C. § 702. That interest at times, may reflect 'aesthetic conservational, and recreational' as well as economic values. *Scenic Hudson Preservation Conference* v. *Federal Power Commission, supra; Office of Communication of United Church of Christ*, 123 U. S. App. App. D. C. 328, 359 F. 2d 994, 1000-1006." *Data Processing Service* v. *Camp, supra*, at 153.

In *Barlow* this Court likewise reversed Court of Appeals and District Court judgments denying standing. Mr. Justice Douglas again rendered the majority opinion, stating:

> "Our decision in Association of Data Processing Service Organizations v. Camp, 396 U. S. ——, 90 S. Ct. 827, 24 L. Ed. 2d ——, leads us to reverse here.
>
> "First, there is no doubt that in the context of this litigation the tenant farmers petitioners here,

have the personal stake and interest that impart the concrete adverseness required by Article III.

"Second, the tenant farmers are clearly within the zone of interests protected by the Act." *Barlow* v. *Collins, supra* at 161.

Parker's petition sets forth no real analysis of *Flast*, *Data Processing* and *Barlow*. He does state that neither they "nor any other decisions of this Court have ever gone so far as to allow any individual or organization whatsoever to bring suit to protest any governmental action or proposed action". (p. 16) Neither of the Courts below, of course, ever said that; nor have plaintiffs taken that position.

The Circuit Court did hold that there is a public interest, evidenced by "administrative as well as congressional concern for natural resources in the present exercise of federal authority . . ." in the environmental resources involved in the Expressway, and that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest." (A. 46-47).

The Circuit Court holding is fully consistent with the two-fold test enunciated by this Court in *Data Processing*. Injury in fact, albeit non-pecuniary in nature, was alleged and was abundantly proved by plaintiffs. The impairment of scenic and natural resource values and the adverse effect upon the environment of the noise, filth and visual offense to the residents of the area, are eloquent and adequate proof of the injury which the challenged project

would work upon the members of the Citizens Committee and the Sierra Club. Their interests are within the zones of interest which are sought to be protected by the statutes which the Circuit Court found relevant.

The fact that the interests of the Citizens Committee and the Sierra Club are non-pecuniary, or in some sense "public" interests, does not adversely affect their standing. In *Scenic Hudson Preservation Conference* v. *Federal Power Commission, supra,* cited with approval by this Court in *Data Processing,* the Circuit Court held that the concept of a party "aggrieved" under a federal statute encompassed organizations such as the *ad hoc* association which was the main opposing intervenor in the Federal Power Commission proceedings involving the proposed pumped storage power project at Storm King Mountain. In rejecting a pecuniary test of standing, urged in that case, as in these cases, the Circuit Court there noted that:

> "Even in cases involving organizational standing to sue, the Supreme Court has not made economic injury a prerequisite where the plaintiffs have shown a direct personal interest." *Id.* at 615.

In the course of its opinion the Circuit Court further stated:

> "In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under §313(b)." *Id.* at 616.

A similar non-pecuniary interest was recognized as adequate to establish standing in *Nashville I-40 Steering Committee* v. *Ellington*, 387 F. 2d 179 (6th Cir. 1967) citing *Scenic Hudson*. Certiorari was also denied in that case by the Supreme Court (390 U. S. 921).

Both the Circuit Court and the District Court also relied on *Road Review League* v. *Boyd, supra*, in which the District Court held that there is no reason why the word "aggrieved" should have a different meaning in the Administrative Procedure Act from the meaning given to it under the Federal Power Act. The Circuit Court phrased its agreement with *Road Review League* as follows:

> "We agree with the conclusion of Judge McLean in Road Review League v. Boyd, 270 F. Supp. 650, 661 (S. D. N. Y. 1967) that the meaning of 'aggrieved' in one act is not different from its meaning in the other. Section 702 of the Administrative Procedure Act provides that a person 'aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.' These plaintiffs, alleging that the Corps and the Secretary of the Army ignored their environmental concerns are 'aggrieved' within the meaning of at least three 'relevant statute[s].'" (Footnotes omitted.) (A. 45)

Parker attempts to distinguish *Scenic Hudson* by a claim that there is no statute "creating a legally protectable interest on behalf of any of the plaintiffs" (p. 17), and that the Citizens Committee and the Sierra Club are not groups "who by their activities and conduct have exhibited a special interest" in "aestetic, conservational, and recreational values".

The first claimed basis of distinction overlooks the point made by *Road Review League*, and by the District Court

and the Circuit Court in these cases, that the Administrative Procedure Act (5 U.S.C. §702) has the same "aggrieved" term as the Federal Power Act. Both the District and Circuit Courts have held, and Parker and the federal defendants now concede, that jurisdiction in these cases lies under the Administrative Procedure Act and that, under *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967), the Engineers' grant of the Permit is reviewable. The only question, therefore, is that of whether the Citizens Committee and the Sierra Club "by their activities and conduct have exhibited a special interest" in "aesthetic conservational and recreational values."

Addressing himself to this question, Parker alleges that:

> ". . . the proof showed that this organization never engaged in any type of conservation activities in the area." (p. 18)

This statement is wholly contrary to the uncontroverted evidence of the Sierra Club activities,* as testified to by two witnesses called by Parker, Club President Philip Berry and David Sive, plaintiffs' trial attorney in those actions. The record also shows that on this very Expressway project representatives of the Sierra Club appeared at no less than four public hearings on the Expressway and gave testimony in opposition to it. Details of other significant conservation activities in the area of the Hudson River and Valley, of the Sierra Club and its Atlantic Chapter, including active intervention before the Federal Power Commission in opposition to the Storm King mountain power project which is involved in *Scenic Hudson*, were furnished by Mr. Sive, testifying as Parker's witness.

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* The scope of the Sierra Club's activities is documented in the Federal Power Commission decision dated August 19, 1970, in the Storm King Proceeding, Consolidated Edison Company of New York, Inc., Project No. 2338.

Parker also claims that:

> ". . . No evidence was produced at trial that the Ad Hoc Citizens Committee were engaged in any aesthetic, conservation or recreational activities other than opposing the expressway." (Parker petition, p. 18)

This is contrary to the testimony of William Hoppen, Esq., Chairman of the executive committee of the Citizens Committee, likewise called by Parker's lawyer and examined at great length in an effort, unbecoming the State of New York, to discredit him and the Committee. Mr. Hoppen testified concerning the Committee's activities in connection with New York State's Forest Preserve, its cooperation with Scenic Hudson Preservation Conference in opposing the Storm King project, its opposition to the construction of an apartment house on the Palisades, and other activities. The statement is, in any event, irrelevant. Scenic Hudson Preservation Conference was an *ad hoc* organization created to oppose the Storm King Project, as was the Nashville I-40 Steering Committee, created to halt the construction of Interstate 40 through Nashville.

To the recent standing cases above cited may be added a host of other cases under which federal courts have expanded the traditional concepts of standing and modified them to permit the assertion by private parties of public or quasi-public rights.

See, e.g.:

> *Office of Communication of United Church of Christ* v. *Federal Communications Commission*, *supra;*
>
> *Environmental Defense Fund* v. *Hardin*, D. C. Cir. May 28, 1970;

Environmental Defense Fund v. *Finch*, D. C. Cir. May 28, 1970;

Puente de Reynosa S.A. v. *City of McAllen*, 357 F. 2d 43 (5th Cir. 1966);

Parker v. *United States*, 309 F. Supp. 593 (Colo. 1969);

Pennsylvania Environmental Council v. *Bartlett*, No. 70-123 Civ., M. D. Pa. April 30, 1970.

Isaak Walton League v. *Hardin*, 313 F. Supp. 1312 (Minn. 1970);

Wilderness Society v. *Hickel*, D. D. C. April 23, 1970;

Respondents are aware of the September 16, 1970 decision of the United States Court of Appeals for the 9th Circuit in *Sierra Club* v. *Hickel*, #24966. In that case it was held that the Sierra Club was without the standing necessary to sue for "a declaratory judgment and preliminary and permanent injunctions enjoining issuance of the permits required for implementation of a plan proposed by Walt Disney Productions, Inc., for a large scale commercial-recreational development in and near Mineral King Valley . . . in California."

Sierra Club v. *Hickel* has no bearing at all on the standing of the Village or the Citizens Committee. The Ninth Circuit opinion itself distinguishes the Circuit Court Opinion in these cases, as well as *Parker* v. *United States*, *supra*, on the ground that:

> "In both of [those] cases . . . the Sierra Club was joined by local conservationist organizations made up of local residents." *Sierra Club* v. *Hickel*, *supra* at 16-17.

Sierra Club v. *Hickel* does set forth a disagreement with the Circuit Court in these cases "[to] the extent that the Sierra Club has standing within the 'private attorney general' role." This disagreement is not material, however, to the Ninth Circuit's principal holding and constitutes no reason for review by this court.

No reason exists for this Court to review the District Court and Circuit Court holdings on standing.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari to the United States Court of Appeals for the 2nd Circuit should be denied.

Respectfully submitted,

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